Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Deployment of Wireline Services Offering Advanced Telecommunications Capability

CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147

Comments on Remand of Covad Communications Company

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SUMMARY

In the *Advanced Services Order*, the Commission concluded that advanced telecommunications services used to provide high-speed connectivity between subscribers and their Internet Service Providers are either "telephone exchange" or "exchange access" services. In its appellate brief, U S West argued that these advanced telecommunications services are neither. Rather, U S West reasoned, such advanced telecommunications services constitute "information access services."

U S West has done little more than to score a debater's point. Contrary to U S West's assertion, the fact that advanced telecommunications services are best classified as information access services has no impact on the obligation of incumbent LECs to comply with the market-opening provisions embodied in Section 251.

Advanced Services Used for Internet Access are Information Access Services

Advanced telecommunications services used to provide high-speed access to the Internet do not fall within the statutory definition of an exchange access service because they are not used to facilitate the making of conventional "telephone toll" calls. Nor can advanced telecommunications services be classified as telephone exchange services. Such a conclusion would be inconsistent with the Commission's holding, in the *GTE DSL Order*, that DSL-based telecommunications services used to provide high-speed connectivity to the Internet are "special access services" that are subject to federal regulation.

By contrast, advanced telecommunications services that use DSL technology to provide high-speed connectivity to the Internet fit squarely within the definition of an information access service. They are used "in connection with the origination, termination,

transmission, switching, forwarding, or routing of telecommunications traffic to or from the facilities of an information services provider."

An ILEC is an ILEC is an ILEC

Tellingly, U S West does not cite *any* authority for the remarkable proposition that, the moment an incumbent LEC provides an information access service, it somehow "morphs" from a regulated local exchange carrier into some as-yet-unnamed unregulated entity – and is thereby freed from the obligation to fulfil the statutory duties imposed by Section 251(b) and (c). The reason, of course, is that no such authority exists.

At the time it adopted the Telecommunications Act, Congress was well aware that, increasingly, incumbent LECs would be providing advanced telecommunications services. Had Congress intended to limit the obligations of incumbent LECs that provide advanced telecommunications services, it easily could have included appropriate language in the statute. Congress, however, did not do so. To the contrary, the provisions that Congress did enact – Section 251(h), 252(g), and Section 706 of the Telecommunications Act – clearly indicate that Congress anticipated that the regulatory regime applicable to conventional interstate telecommunications services, including Sections 251(b) and (c), would apply to advanced telecommunications services.

U S West's approach also is unsound as a matter of policy. U S West would have the Commission apply the market-opening Section 251 regime to voice-oriented telecommunications services, while effectively forbearing from applying this regime to data-oriented services. The Commission's rules have never distinguished between telecommunications services used for voice and data-oriented services. The growth of the

Internet, and the growing deployment of IP and other packet-based networks that carry both voice and data traffic, make it especially inappropriate for the Commission to create such an artificial regulatory distinction now.

CLECs That Provide Advanced Services Used for Internet Access are Entitled to UNEs, Collocation, and Interconnection

The Commission also should reject U S West's assertion that, because advanced telecommunications services used for Internet access are neither telephone exchange nor exchange access services, competitive LECs that seek to offer these services have no right to interconnect with an incumbent LEC's network in its central office, collocate equipment there, or obtain unbundled network elements. Most of the statutory duties specified in Sections 251(b) and (c) are owed to any competitive entrant that seeks to provide any telecommunications service. Advanced telecommunications services, indisputably, are telecommunications services. The *only* statutory duty that is restricted to providers of telephone exchange and exchange access is the incumbent LECs' duty to interconnect under Section 251(c)(2). However, as a telecommunications carrier, an incumbent LEC has an express statutory duty, under both Section 201(a) and 251(a), to interconnect with telecommunications carriers that seek to provide advanced telecommunications services used to provide Internet access.

The Commission Should Establish a Tariff-based Federal Regime

While Section 251 provides ample authority for the pro-competitive regime that the Commission adopted in the *Advanced Services Order*, the Commission should use this proceeding to adopt a tariff-based Federal regime for advanced services used for Internet access. The tariffs would specify the terms on which incumbent LECs must offer providers of such

advanced telecommunications services interconnection, collocation, access to network elements, and line sharing. This approach would best promote the rapid, nationwide deployment of advanced telecommunications services used for Internet access. The Commission has ample authority, under Section 201 and related provisions of the Communications Act, to adopt such a regime.

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INTRODUCTION

The Commission requested this remand in order to respond to arguments raised by U S West before the D.C. Circuit in its challenge to the *Advanced Services Order.*[1] In its filings, U S West correctly pointed out that advanced telecommunications services that use DSL technology to provide high-speed connectivity to the Internet are neither "telephone exchange service" nor "exchange access service."[2] Based on that insight, however, U S West went on to

[1] *See* FCC Public Notice, "*Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order*," DA 99-1853, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147 (rel. Sep. 9, 1999) ("*Notice*").

[2] The *Advanced Services Order* focused on services that use DSL technology to provide high-speed connectivity between subscribers and the local premises of their Internet Service Provider. Such services are sometimes referred to as "DSL service." Strictly speaking, however, DSL is not a service. Rather, DSL is technology that enables existing copper loops to carry content at high-speeds. While DSL technology has proven to be an effective means to provide high-speed connectivity to the Internet, DSL technology has other potential applications. For purposes of

argue that incumbent local exchange carriers are not "acting in the capacity of an ILEC" when they provide such advanced telecommunications services and, therefore, are not subject to the market-opening provisions contained in Section 251 of the Communications Act. U S West further claimed that, because competitive local exchange carriers that offer such advanced telecommunications services are not providing telephone exchange or access service, they have no right to interconnect with an incumbent LEC's network, collocate equipment on an incumbent LEC's premises, or obtain unbundled network elements ("UNEs") from an incumbent LEC.

The Commission should not allow U S West to lead it down the wrong road. As demonstrated below, the fact that advanced telecommunications services used to provide high-speed access to the Internet are best classified as information access services – rather than telephone exchange or exchange access service – has no impact whatsoever on the classification of an incumbent carrier that provides such services as an incumbent LEC. These carriers, therefore, must comply fully with the obligations contained in Section 251. At the same time, pursuant to Section 251, competitive LECs that offer advanced telecommunications services used to provide Internet access are entitled to interconnection, access to unbundled network elements, and collocation.

The Commission should see U S West's arguments for what they are: an attempt to avoid full compliance with the market-opening provisions embodied in the Telecommunications Act. In effect, U S West asks the Commission to conclude that Congress sought to provide consumers with the benefits of competition in the market for conventional,

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clarity, Covad will use the term "advanced telecommunications services" as encompassing services that use DSL technology to provide high-speed connectivity to the Internet.

circuit-switched voice telephony, while allowing the incumbent LECs to leverage their current monopoly into the emerging market for advanced telecommunications services.

This is plainly incorrect. Congress adopted the Telecommunications Act in order to bring consumers the benefits of competition in all telecommunications markets. To achieve this goal, Congress required incumbent LECs to provide potential rivals with access to UNEs, collocation, and interconnection – all of which are critical for entry. The Act is technology neutral; its pro-competitive provisions apply to both voice and data-oriented services.

Consistent with these goals, the Commission should recognize that advanced telecommunications services that use DSL technology to provide high-speed connectivity to the Internet are best classified as information access services, while rejecting U S West's disingenuous efforts to sever such services from the pro-competitive regime adopted by Congress.

I. ADVANCED TELECOMMUNICATIONS SERVICES USED TO PROVIDE HIGH-SPEED ACCESS TO THE INTERNET ARE INFORMATION ACCESS SERVICES

In the *Advanced Services Order*, the Commission considered the regulatory classification of telecommunications services that provide consumers with high-speed access to the Internet. The Commission concluded that such "advanced telecommunications services offered by incumbent LECs are either 'telephone exchange service' or 'exchange access.'"[3] In its appellate brief, U S West argued that these advanced telecommunications services are

[3] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24032 (1998) (*"Advanced Services Order"*).

neither. Rather, U S West reasoned, these advanced telecommunications services constitute "information access services."[4] U S West is correct. The incumbent, however, has done little more than to score a debater's point. Whether advanced telecommunications services used to provide Internet access are classified as telephone exchange, exchange access, or information access services has no impact on the obligation of incumbent LECs to comply with the market-opening provisions embodied in Section 251.

A. Advanced Telecommunications Services Used to Provide Internet Access are Neither Exchange Access Nor Telephone Exchange Service

1. Exchange access service

Advanced telecommunications services used to provide high-speed access to the Internet do not constitute exchange access services. Section 3 of the Communications Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of *telephone toll service*."[5] "Telephone toll service," in turn, is defined as "telephone service between stations in different exchanges for which there is made a separate charge."[6] The advanced telecommunications services at issue in this proceeding are not used to facilitate the making of conventional telephone toll calls. Rather, as the Commission has recognized, they are used to provide "a high speed connection between

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[4] Brief of U S West Communications, Inc., No. 98-1410, at 16-30 (D.C. Cir. May 17, 1999) ("U S West Brief").

[5] 47 U.S.C. § 153(16) (emphasis added).

[6] *Id.* at § 153(48).

and end user subscriber and an Internet Service Provider."[7] Therefore, they do not fall within the statutory definition of an exchange access service.

2. Telephone exchange service

Prior to 1996, the Communications Act defined a telephone exchange service as a "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge."[8] Recognizing the development of packet switching and other new technologies, when Congress enacted the Telecommunications Act of 1996, it expanded the definition of telephone exchange service to include "comparable services provided through a system of switches, transmission equipment, or other facilities . . . by which a subscriber can originate and terminate a telecommunications service."[9]

Historically, most subscribers have accessed the local premises of their Internet or other information service provide using their local exchange carrier's conventional dial-up service. Pursuant to the Commission's Rules, incumbent LECs have always treated this traffic in exactly the same way that they treat all traffic between a user and a business within the same local calling area – as local exchange traffic.[10] The advanced telecommunications services at

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[7] *GTE Telephone Co., GTOC Tariff No.1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22470 (1998) ("*GTE DSL Order*"); *see also Implementation on Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended,* 11 FCC Rcd 21905, 22024 n.621 (1996) ("*Non-Accounting Safeguards Order*") ("ISPs do not use exchange access.").

[8] 47 U.S.C. § 153(r) (1988).

[9] *Id.* at § 153(47).

[10] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges,* 12 FCC Rcd 15982, 16132 (1997), *aff'd sub nom.*

issue in this proceeding, it can be argued, are "comparable" to conventional local exchange service because they, too, enable subscribers to establish a connection with the local premises of their Internet or other information service provider. Thus, were it writing on a clean slate, the Commission could find that these services are local exchange services.

The Commission, however, is not writing on a clean slate. Three months after it adopted the *Advanced Services Order,* the Commission issued a definitive ruling regarding the regulatory classification of DSL-based services used to provide Internet connectivity. In the *GTE DSL Order*, the Commission considered whether GTE could tariff its proposed ADSL service in the Federal jurisdiction. In resolving this issue, the Commission ruled squarely that "GTE's ADSL offering is a special access service" that is subject to federal regulation.[11] More recently, in the *ISP Reciprocal Compensation Order*, the Commission concluded that a significant portion of the traffic between subscribers and their ISPs is interstate access traffic.[12] Classifying advanced telecommunications services that use DSL technology to provide high-speed access to the Internet as a telephone exchange service would be inconsistent with the Commission's decisions in these orders.

Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998) ("ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries"); *MTS/WATS Market Structure Order,* 97 F.C.C.2d 682, 860 (1983) (Enhanced service providers "obtain local exchange service."); *see also Implementation of Local Competition Provisions of the Telecommunication Act of 1996*, CC Docket No. 96-98, FCC 99-38, rel. Feb. 26, 1999, at ¶ 5 (*"ISP Reciprocal Compensation Order"), appeal pending sub nom. Bell Atlantic Tel. Co. v. FCC*, No. 99-1094 (D.C. Cir.) (ISP-bound traffic is classified as intrastate for separations purposes.).

[11] *GTE DSL Order*, 13 FCC Rcd 22466, 22480 (1998).

[12] *See ISP Reciprocal Compensation Order* ¶ 16.

B. Advanced Telecommunications Services Used to Provide Internet Access are Information Access Services

For the reasons set forth above, Covad is convinced that any effort to shoehorn advanced telecommunication services that use DSL to provide high-speed access to the Internet within the statutory definitions of exchange access or telephone exchange service is doomed to fail. Rather, Covad believes that the Commission should hold that, based on the additional record compiled since the adoption of the *Advanced Services Order*, it has now concluded that such services are best classified as information access services.

The term "information access service" was first used in the Modification of Final Judgment ("MFJ"). The MFJ defined information access service as a:

> specialized exchange telecommunications service . . . in an exchange area in connection with the origination, termination, transmission, switching, forwarding, or routing of telecommunications traffic to or from the facilities of a provider of information services.[13]

The Decree Court explained that information access services are similar to – but distinct from – exchange access services. While exchange access services permit the "origination or termination of an interexchange telephone call," information access services provide "similar transmission assistance for information services."[14] Under the Decree, the Bell Operating Companies were forbidden to discriminate in the provision of either service.[15] In

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[13] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (1982).

[14] *Id.* at 196 n.268.

[15] *Id.* at 227. Information access service and information services are distinct, and mutually exclusive, categories. Like the statutory definition of an information access service, the statutory definition of an information service is adopted, in relevant part, from the definition embodied in the MFJ. *Compare United States v. American Tel. & Tel. Co.*, 552 F.Supp. at 229 *with* 47 U.S.C. § 153(20). In the *Gateway Order*, the Decree Court made clear that the simple transmission of data between a subscriber and an information service provider constitutes an information

adopting the Telecommunications Act of 1996, Congress preserved the concept of "information access services" and made clear that it constitutes a distinct category of LEC-provided telecommunications services.[16]

Advanced telecommunications services that use DSL technology to provide high-speed connectivity to the Internet fit squarely within the definition of an information access service. When a subscriber uses such a service, his or her information is transmitted from the subscriber's premises to an LEC central office. The subscriber's information is then routed onto a packet switched network, which forwards the subscriber's information to the premises of the subscriber's ISP. The service, therefore, plainly is a service used "in connection with the origination, termination, transmission, switching, forwarding, or routing of telecommunications traffic to or from the facilities of a provider of information services."[17]

Classifying DSL-based advanced services used to provide Internet connectivity as information access services is fully consistent with existing Commission precedent. In the *Non-Accounting Safeguard Order*, the Commission expressly recognized that the Telecommunications Act codified the distinction, embodied in the MFJ, between exchange access and information access.[18] This distinction is reflected in the *GTE DSL Order*. In that Order, the Commission did *not* address whether GTE's DSL offering is an "exchange access

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access service, while functions that involve "the manipulation of the content . . . of the information sent and received" constitutes an information service. *See U.S. v. Western Electric,* 673 F.Supp, 525, 592-93 (D.D.C. 1987). The Telecommunications Act codified this distinction.

[16] *See* 47 U.S.C. § 251(g) (LECs must provide "exchange access, information access, and exchange services for such access to interexchange carriers and information service providers" on non-discriminatory terms.).

[17] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (1982).

[18] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* 11 FCC Rcd 21905, 22024 n.621 (1998).

service" as that term is used in Section 3 of the Communications Act. Rather, the agency found the service to be a "special access service" within the meaning of the Section 69.2 of the Commission's Rules.[19] Unlike the statutory definition, the Commission's Rules do not define an access service as one used to originate and terminate telephone toll service. Rather, the Rules define an access service as a service used "for the origination or termination of any interstate or foreign telecommunication."[20] DSL-based advanced telecommunications services that are used to originate a communication from the subscriber, to his or her ISP, and ultimately to a computer server located in a different State or country fit readily within this definition.

At the time it adopted the *Advanced Services Order*, the Commission noted that it intended to consider more thoroughly the regulatory classification of DSL-based services in the context of the subsequent *GTE ADSL* proceeding and other similar proceedings.[21] The Commission has now done so. In light of the record developed in those proceedings, as well as in the current remand, Covad urges the Commission to expressly hold that advanced services that use DSL technology to provide high-speed Internet connectivity are information access services.

II. AN INCUMBENT CARRIER DOES NOT CEASE TO BE AN ILEC WHEN IT PROVIDES AN INFORMATION ACCESS SERVICE

While U S West correctly noted that advanced services that use DSL technology to provide high-speed Internet connectivity are information access services, there is no merit whatsoever in US West's contention that, whenever an incumbent LEC provides a DSL service,

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[19] *See GTE DSL Order*, 13 FCC Rcd at 22480.

[20] *Compare* 47 C.F.R. § 69.2(b) *with* 47 U.S.C. § 153(16).

[21] *See Advanced Services Order*, 11 FCC Rcd at 24032.

it can shed its skin and evade its obligations under Section 251. As even a cursory reading of the statute makes clear, regardless of the activity in which it engages, an ILEC is an ILEC is an ILEC.[22]

A. Section 251(b) and (c) Apply to Local Exchange Carriers, Regardless of the Service They are Providing

In its brief, U S West rests its case on the statutory definition of a local exchange carrier. U S West correctly notes that Section 3 of the Communications Act defines a local exchange carrier as "any person that is engaged in the provision of telephone exchange or exchange access service."[23] In a breathtaking leap, however, U S West goes on to assert that:

> If a carrier is providing a service that qualifies as either "telephone exchange service" or "exchange access," the carrier is acting as a "local exchange carrier" and must provide the service subject to the obligations of section 251(b) of the Act and, if the carrier is an incumbent LEC, section 251(c). Conversely, if a carrier is providing something that is neither "telephone exchange service" nor exchange access," it is not acting in the capacity of a LEC, and it may provide the service free from LEC regulation."[24]

Tellingly, U S West does not cite *any* authority for the remarkable proposition that, the moment an incumbent LEC provides an information access service, it somehow "morphs" from a regulated local exchange carrier into some as-yet-unnamed unregulated entity –

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[22] *Cf.* Gertrude Stein, *Sacred Emily* (1913) (discussing the unchangeable nature of roses).

[23] U S West Brief at 4-5 (quoting 47 U.S.C. § 153(26)).

[24] *Id.* at 6.

and is thereby freed from the obligations to fulfil the statutory duties imposed by Section 251(b) and (c). The reason, of course, is that no such authority exists.[25]

Nothing in Section 251 suggests that the Section's market-opening obligations apply only when a LEC provides a voice-oriented, conventional telecommunications service. Congress was well aware that, increasingly, incumbent LECs would be providing advanced telecommunications services.[26] Had Congress intended to limit the obligations of incumbent LECs that provide advanced telecommunications services it easily could have done so. For example, Congress could have stated, in Section 251(h), that an entity is an incumbent LEC in a given area only "*to the extent* that it provides local exchange service in that area." Alternatively, Congress could have stated in Section 251(c), that "each incumbent local exchange carrier *that provides a conventional telecommunications service* has the following duties." Or Congress could have added an additional sub-section within Section 251 that expressly stated that the duties contained in Section 251(b) and (c) do not apply when an LEC provides an advanced telecommunications service. Congress, however, did none of these things. U S West's bald assertions cannot create restrictions that Congress did not adopt.

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[25] U S West may be thinking of the cases in which courts have held that a local exchange carrier can be a *common carrier* for some purposes, but not for others. *See, e.g., Computer & Communications Indus. Ass'n v. FCC,* 693 F.2d 198, 203 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983). Those decisions are inapposite. The courts have recognized that an LEC can act as a common carrier in some situations, and as a non-common-carrier in other situations. For example, an LEC acts as a common carrier when it provides a basic telecommunications service, but as a non-carrier when it provides an information service. The courts further have recognized that the type and degree of regulation can differ depending on the service the LEC provides. In no case, however, has a court held that an LEC that provides an information service ceases to be an LEC. To the contrary, under the Commission's Rules, an LEC that provides information services is subject to regulatory requirements that are not applicable to a non-LEC information service provider. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Order, 77 F.C.C. 2d 384, 432 (1980) (finding that carrier-provided enhanced services fall within the Commission's ancillary jurisdiction under Title I of the Communications Act).

[26] *See* 47 U.S.C. § 157 (note) (codifying Section 706 of the Telecommunications Act).

The provisions that Congress actually did adopt – Sections 251(h), Section 252(g), and Section 706 of the Telecommunications Act – clearly refute U S West's assertion that the Commission has impermissibly "extend[ed] local telephone marketplace regulation to . . . new data and Internet access services."[27]

Section 251(h). Section 251(h) of the Communications Act defines the term "incumbent local exchange carrier" for purposes of Section 251(c). Pursuant to Section 251(h), the term local exchange carrier "means, with respect to an area, the local exchange carrier that . . . on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area."[28] Thus, under Section 251(h), there is only one relevant inquiry: did a carrier provide local exchange service in a given service area on February 8, 1996. If it did, and if it continues to do so, then it is subject to the requirements of Section 251(c).

Section 706. By adopting Section 706 of the Telecommunications Act, Congress affirmatively sought to promote the provision of advanced telecommunications services. In order to do so, Congress directed the Commission and the State Public Utilities Commissions to use "price cap regulation, regulatory forbearance, measures to promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure development."[29] Congress' references to forbearance and the adoption of price cap (rather than rate of return) regulation makes clear that the drafters of the Telecommunications Act assumed

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[27] U S West Brief at 4.

[28] 47 U.S.C. § 251(h)(1)(A).

[29] *Id.* at § 157 (note).

that, absent Commission action, the regulatory regime applicable to conventional interstate telecommunications services – including Section 251(c) – also would apply to advanced telecommunications services. This includes the requirements contained in Section 251(c).[30]

Section 252(g). The Modification of Final Judgement recognized that a Bell Operating Company could provide three distinct categories of service: exchange service, exchange access, and information access. The Decree imposed identical non-discrimination requirements on BOC provision of each of these services.[31] Section 251(g) of the Communications Act expressly preserves these obligations. This provision states that:

> [E]ach local exchange carrier, to the extent that it provide wireline services, shall [continue to] provide exchange access, *information access*, and exchange services for such access to interexchange carriers and information service providers in accordance with the . . . non-discriminatory interconnection restrictions and obligations . . . that apply to such carrier . . . under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superceded by regulations prescribed by the Commission . . . .[32]

This provision provides further proof that Congress intended to apply the pro-competitive regulatory regime that it adopted in 1996 to incumbent local exchange carriers – regardless of whether they are providing telephone exchange, exchange access, or information access services. As U S West recognizes, advanced telecommunications services used to provide

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[30] Indeed, Congress determined that the market-opening provisions contained in Section 251(c) are so important it expressly prohibited the Commission from forbearing from applying this requirement until it has been "fully implemented." *Id.* at § 160(d). As the Commission has recognized, this restriction is fully applicable to advanced telecommunications services. *See Advanced Services Order*, 11 FCC Rcd at 24044-48.

[31] *See United States v. AT&T Tel. & Tel. Co.*, 552 F.Supp. at 227.

[32] 47 U.S.C. § 251(g) (emphasis added).

high-speed access to the Internet are information access services. U S West's assertion that Congress did not intend for incumbent LECs to be subject to these obligations when they provide such services simply cannot be squared with the express statutory language.

B. As a Matter of Policy, the Commission Should Not Attempt to Distinguish Between Voice-Oriented and Data-Oriented Services

Under U S West's approach, the Commission would apply its pro-competitive regulatory regime to conventional voice-oriented telecommunications services, while effectively forbearing from applying this regime to conventional data-oriented advanced telecommunications services. This approach is as unsound as it is unfeasible. The Commission's rules have never distinguished between telecommunications services used for voice and data. Incumbent LECs must provide both services on a common carrier basis: they must comply with the same tariff, non-discrimination, and other regulatory obligations when they provide data-oriented X.25, frame relay, ATM packet services as they do when they provide conventional circuit-switched voice-oriented services.[33]

Any effort to impose such a regulatory distinction between voice and data at this late date is doomed to failure. The lines between these services have never been precise. For example, subscribers have always used the LECs' conventional voice-oriented service to obtain "dial-up" access to the Internet and other information services. Similarly, subscribers can use ATM-based services to carry both voice and data content.

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[33] *See, e.g., Advanced Services Order*, 13 FCC Rcd at 24030; *Independent Data Communications Manufacturers Association Petition for a Declaratory Ruling That AT&T's InterSpan Frame Relay Service is a Basic Service*, 10 FCC Rcd 13717 (1995), *recon. pending.*

The growth of the Internet, and the growing deployment of IP and other packet-based networks, make it especially inappropriate for the Commission to create artificial distinctions in its regulations now. In the coming years, both voice and data traffic are likely to migrate to IP or ATM-based platforms.[34] Given the increasing role that advanced telecommunications services will play, it is critical that the Commission's policies foster the growth of a competitive market. The best way to do so is to make clear that incumbent monopolists that provide advanced telecommunications services must do so subject to the pro-competitive regulatory regime adopted by Congress.

III. COMPETITIVE LECs THAT PROVIDE ADVANCED TELECOMMUNICATIONS SERVICES USED FOR INTERNET ACCESS HAVE AN EXPRESS STATUTORY RIGHT TO UNBUNDLED NETWORK ELEMENTS, COLLOCATION, AND INTERCONNECTION

In its filings in the D.C. Circuit, U S West also asserted that "if [it] is right that advanced data services are not 'telephone exchange service' or 'exchange access,' competitors [that provide advanced telecommunications services] have no rights to interconnect with U S West's data networks in its central offices," collocate equipment there, or obtain unbundled network elements.[35] This is a *non sequitor*. Most of the statutory duties specified in Sections 251(b) and (c) are owed to any competitive entrant that seeks to provide a telecommunications service. Advanced telecommunications services used to provide Internet access, indisputably, are telecommunications services.

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[34] AT&T, for example, has announced that, as part of its global joint venture with BT, it will develop a global IP-based network that will carry both voice and data. *See AT&T and BT to Form Global Venture to Serve Customers Around the World*, AT&T Press Release at 1 (rel. July 27, 1998).

[35] Petitioner's Response to the Motion of Federal Communications Commission for Remand to Consider Issues, *US West Communications, Inc. v. FCC*, No. 98-1410, at 11 n.11 (D.C. Cir.) (July 6, 1999).

A. The Fact That Advanced Services Used to Provide Internet Access Are Neither Telephone Exchange Nor Exchange Access Service Does Not Excuse an Incumbent LEC From Fulfilling its Section 251 Obligations

Under Section 251 of the Communications Act, incumbent LECs owe broad duties to all providers of telecommunications services. Specifically, incumbent LECs are required to provide network elements on an unbundled basis, provide physical collocation, make retail services available at wholesale rates for resale, negotiate interconnection agreements in good faith, and give advance public notice of all network changes.[36]

Unbundled network elements. By its terms, Section 251(c)(3) provides that incumbent LECs must provide access to unbundled network elements to "any requesting telecommunications carrier for the provision of a telecommunications service."[37] The Commission has repeatedly rejected proposals to impose restrictions on the types of telecommunications services a requesting carrier can use UNEs to provide.[38] Consistent with this approach, a competitive LEC has the right to obtain UNEs to provide advanced telecommunications services. Indeed, in its recent *UNE Remand Order*, the Commission

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[36] *See* 47 U.S.C. § 251(c).

[37] *Id.* at § 251(c)(3).

[38] *See Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15679 (1996) ("*Local Competion Order*"); *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 13042, 13048 (1996); *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12495-96 (1997)).

required incumbent LECs to offer packet switching – which is an advanced service – as a UNE in certain circumstances.[39]

Physical collocation. Section 251(c)(6) imposes a further statutory duty on incumbent LECs to provide carriers with "physical collocation of equipment necessary for . . . access to unbundled network elements."[40] The Commission has recognized that this duty is owed to "any requesting telecommunications carrier."[41] The Commission, moreover, has made clear that its collocation rules "apply to all telecommunications services, including advanced telecommunications services."[42]

Additional obligations. With one exception, the other obligations imposed on incumbent LECs by Section 251(c) do not run only to providers of telephone exchange service or exchange access services. First, the Commission has recognized that Section 251(c)(4) requires incumbent LECs to negotiate resale agreements with "all requesting telecommunications carriers."[43] Second, the plain language of Section 251(c)(1) states that the duty to negotiate in good faith is similarly owed to any "requesting telecommunications carrier."[44] And finally, the

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[39] *See FCC Promotes Local Telecommunications Competition*, FCC News Release, Summary at 2 (Sept. 15, 1999) (requiring incumbent LECs to unbundle packet switching where the ILEC collocates its DSLAM at its remote terminal, but does not provide competitive LECs with this opportunity).

[40] 47 U.S.C. § 251(c)(6).

[41] *Local Competition Order*, 11 FCC Rcd at 15808.

[42] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, 4773 (1999), *on appeal sub nom. GTE Service Corp. v. FCC*, No. 99-1176 (D.C. Cir.)..

[43] *Local Competition Order*, 11 FCC Rcd at 15936.

[44] 47 U.S.C. § 251(c)(1).

Commission has concluded that the network information disclosure requirements of Section 251(c)(5) are so broad that they not only require incumbent LECs to provide notice of network changes to providers of telecommunications services, but to providers of information services as well.[45]

B. Section 251(a) Requires Incumbent LECs to Provide Interconnection to Providers of Advanced Telecommunications Services Used for Internet Access

The *only* provision of Section 251 that is limited to providers of telephone exchange and exchange access service is Section 251(c)(3). This provision requires incumbent LECs to provide interconnection to any requesting telecommunications carrier "for the transmission and routing of telephone exchange service and exchange access" service.[46] Because carriers that provide advanced telecommunications services used for Internet access do not provide either of these services, Section 251(c)(3) does not provide them with a right of interconnection.[47] Nonetheless, U S West's broad claim that such carriers "have no right to interconnect" with incumbent LECs is plainly incorrect.

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[45] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 19392, 19473 (1996).

[46] 47 U.S.C. § 251(c)(2)(A).

[47] Under present network configurations, providers of DSL-based advanced services used for Internet access typically do not interconnect with the incumbent LEC network. Rather, they provide a dedicated connection between a subscriber and the subscriber's ISP. This connection consists of two components: the UNE-based DSL transport between the subscriber's premises and the incumbent LEC central office and the competitive LEC-provided local packet network between the incumbent LEC's central office and the ISP's local premises. In some circumstances, however, a competitive LEC that provides DSL-based loops might want to interconnect with an incumbent LEC's local packet network. Alternatively, a competitive LEC provider of local packet services might want to interconnect with the incumbent LEC's DSL service.

Incumbent LECs – like all telecommunications carriers – have a statutory duty, pursuant to Section 251(a)(1) of the Communications Act, "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[48] The Commission has specifically determined that this section does not distinguish between voice and data services and, therefore, applies to advanced telecommunications services.[49]

To be sure, Section 251(a)(1) does not expressly require incumbent LECs to provide interconnecting parties with the full spectrum of rights listed in Section 251(c)(2) of the statute. The Commission, however, has authority to require incumbent LECs to do so.[50]

IV. THE COMMISSION SHOULD USE ITS AUTHORITY UNDER SECTION 201 AND RELATED PROVISIONS OF THE COMMUNICATIONS ACT TO ESTABLISH A TARIFF-BASED FEDERAL REGIME FOR ADVANCED TELECOMMUNICATIONS SERVICES USED FOR INTERNET ACCESS

While the Commission has ample authority under Section 251 to apply its established market-opening regime to advanced telecommunications services, Covad urges the Commission to use this proceeding to establish a tariff-based Federal regime for advanced telecommunications services used for Internet access. Under this approach, incumbent LECs would file Federal tariffs detailing the prices, terms, and conditions under which they would provide interconnection, access to conditioned loops, line sharing, and collocation to providers of such advanced telecommunications services.

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[48] *Id.* at § 251(a)(1).

[49] *Advanced Telecommunications Services Order*, 13 FCC Rcd at 24035.

[50] *See Expanded Interconnection With Local Telephone* Company *Facilities,* First Report and Order, 7 FCC Rcd 7369, 7472-74 (1992) (Commission's authority to bar unjust and unreasonable practices provides broad authority to bar incumbent LEC practices that impede competition in the interstate access market).

A. The Adoption of a Federal Regime Would Promote the Rapid, Nationwide Deployment of Advanced Telecommunications Services

Section 706 of the Telecommunications Act directs the Commission to take actions to promote the deployment of advanced telecommunications services.[51] The adoption of a tariff-based Federal regime for advanced telecommunications services used to provide high-speed access to the Internet would plainly advance this important statutory objective.

The Section 251/252 interconnection regime has created significant impediments to the nationwide deployment of advanced telecommunications services. Under this regime, the Commission establishes basic interconnection policies. Implementation, however, occurs either in the context of interconnection negotiations or – in many cases – State arbitrations. This often is a costly and time-consuming process, which frequently results in delays of at least nine months to a year.

The State-by-State arbitration process has yielded a hodge-podge of inconsistent regulations, which now govern the operations of national carriers such as Covad. As a result, UNE terms and prices vary widely from jurisdiction to jurisdiction and, in some cases, have raised barriers to the deployment of advanced telecommunications services used to provide Internet access. Many States, for example, have permitted incumbent LECs to impose a "premium" for loops that are certified to carry digital traffic.[52] In other cases, States have been

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[51] *See* 47 U.S.C. § 157 (note).

[52] For example, in Texas the monthly charge for an analog-certified loop is $12.14 in urban areas, $13.65 in suburban areas, and $18.98 in rural areas. By contrast, the monthly charge for loops certified to carry digital traffic is $34.91 in urban areas, $37.54 in suburban areas, and $46.09 in rural areas. *See Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops*, Docket Nos.16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, 17781, Arbitration Award (Tex. Public Utility Comm'n Dec. Dec. 17, 1997).

slow to require incumbent LECs to provide DSL-capable loops on an unbundled basis, despite clear mandates from the FCC requiring the incumbent LECs to do so.

The establishment of a Federal regime for advanced telecommunications services used to provide access to the Internet would eliminate the need for State-by-State arbitrations of interconnection prices and terms. This, in turn, would lead to the swifter implementation of pro-competitive measures intended to spur broadband deployment. Under such a regime, disputes over the terms and prices of unbundled loops, line sharing, collocation, and interconnection would be resolved through the Commission's tariff review process for incumbent LECs, which is subject to a five-month statutory deadline. This framework would provide an efficient mechanism for the prompt and uniform resolution of disputes and promote consistent incumbent LEC practices.[53]

B. The Federal Regime Should Have Four Basic Elements

A tariff-based Federal regime for advanced telecommunications services used to provide high-speed access to the Internet should have four basic elements. Incumbent LECs should be required to provide advanced telecommunications carriers with access to: (1) unbundled, conditioned loops, (2) line sharing, (3) cageless collocation, and (4) the right to interconnect at cost-based rates.

Access to conditioned loops at cost-based prices. The availability of conditioned loops at cost-based prices is essential for the competitive provision of DSL-based advanced telecommunications services used to provide Internet access. The Commission's

[53] 47 U.S.C. § 204(a).

Federal regime should require prompt deployment of DSL-conditioned loops, and should not allow imposition of non-cost-based "digital premium" charges. In addition, to ensure that competitive LECs have meaningful access to DSL-capable loops offered in Federal tariffs, the regime should require incumbent LECs to provide automated access to information concerning loop length, the presence of analog load coils, the presence and number of bridge taps, and the presence of a digital loop carrier device as part of the ordering process.

Line sharing. Some forms of DSL technology makes it possible for incumbent LECs to carry two "streams" of user information: a slow-speed voice traffic stream and a high-speed data traffic stream. Incumbent LECs currently use this technology to "share" lines with their own DSL operations and those of preferred ISP resellers. This allows customers who want to use an incumbent LEC's voice service and the incumbent LEC's DSL-based data service to send both streams of traffic over the same loop, thereby realizing significant efficiencies.

As the record in this docket demonstrates, incumbent LECs have refused to provide line sharing to competing providers of DSL-based services. As a result, an incumbent LEC voice customer who wants to use a DSL-based service provided by another carrier may not obtain both services over a single loop. Rather, the customer must obtain competitive DSL-based service over a second, separate loop – thereby incurring significant additional costs and wasting resources. As Covad and others have demonstrated, there is no technical justification for the incumbent LECs' discriminatory treatment of voice customers who seek to obtain competitively provided DSL-based services.[54]

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[54] *See, e.g., Comments of Covad Communications Company*, CC Docket No. 98-147, Affidavit of Anjali Joshi (filed June 15, 1999).

The incumbent LECs' refusal to provide line sharing has impeded competition in the provision of advanced telecommunications services to residential customers. In tariffs filed at the Commission, the incumbent LECs do not appear to have attributed *any* loop costs to their DSL-based services. By contrast, competing providers of DSL-based services must pay upwards of $20 to $25 per month for an unbundled conditioned loop, placing them at a considerable disadvantage in the provision of services to mass market residential customers and small businesses.

The Commission's Federal regime should not allow the incumbent LECs to use their monopoly in the provision of residential voice service to cross-subsidize their advanced service offerings.[55] Rather, to ensure that all consumers receive the benefits of competition in the provision of services used to provide hgh-speed access to the Internet, the Commission should require incumbent LECs to provide DSL line sharing and to impute the costs of line sharing to their own DSL-based services. While the Commission could require line sharing using its authority to adopt regulations governing the Section 251 interconnection process, the most effective means to do so would be to require Federal tariffing of such offerings.

Collocation. In order to provide competitive DSL-based services, competitive providers also need the ability to collocate equipment, known as digital subscriber line access multiplexers ("DSLAMs"), in every incumbent LEC central office.[56] This equipment is used to

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[55] *Cf. Telephone Company – Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 10 FCC Rcd 244, 315 (1994) (establishing cost allocation safeguards to ensure that users of regulated local telephone services do not bear the cost of incumbent LEC provision of non-regulated "video dialtone" services).

[56] Providers of DSL-based services also typically need to collocate remote access management equipment, digital packet switching equipment, cross-connect equipment, and routers.

interconnect with unbundled loops and to route a subscriber's data traffic onto a packet network for high-speed delivery to the subscriber's ISP.

Earlier this year, the Commission adopted national collocation standards, including cageless collocation requirements that promise to speed the deployment of advanced telecommunications services.[57] This is a very positive development. Nonetheless, competitive providers of DSL-based services such as Covad are still encountering incumbent LEC resistance to the collocation of necessary equipment.[58] Moreover, there are still considerable disparities in the terms and prices on which collocation is made available from State to State. Adoption of a Federal regime would promote more uniform incumbent LEC collocation practices and deter incumbent LEC resistance.

Right to Interconnect. The most efficient means to accommodate the growth of Internet-bound traffic is to ensure that such traffic can be routed to a packet network at the earliest possible point in the network path of a call. The Commission's rules, therefore, should ensure that incumbent LECs give efficient interconnection opportunities to packet service providers who transport DSL traffic from an incumbent LEC's central office to an ISP's premises.

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[57] *See Deployment of Wireline Services Offering Advanced Telecommunications Services Capability*, 14 FCC Rcd 4761 (1999). Incumbent LECs have challenged the Commission's order before the U.S. Court of Appeals for the D.C. Circuit. *See GTE Service Corp. v. FCC*, No. 99-1176 (D.C. Cir.).

[58] The anticompetitive practices of the incumbent LECs with respect to collocation are discussed in greater detail in the *Comments of Covad Communications Company*, CC Docket No. 98-147, at 6-10 (filed Sep. 25, 1998).

C. Section 201 and Related Provisions Vest the Commission With Authority to Adopt a Uniform Federal Regime

The Commission has ample authority, under Section 201 of the Communications Act and related provisions, to establish a Federal regime for providers of advanced services used to provide high-speed access to the Internet. The Act makes clear that "nothing" in Section 251 "shall be construed to limit or otherwise affect the Commission's authority under Section 201."[59] Accordingly, notwithstanding the existence of the Section 251 regime, the Commission can use its authority under Section 201 to require incumbent LECs to provide carriers that offer hgh-speed Internet connectivity services with interconnection, conditioned loops, line sharing, and collocation pursuant to Federal tariffs.

The *Special Access Expanded Interconnection Order* provides ample precedent for adoption of such a regime. In the Order, the Commission used its authority under Section 201 and related provisions of the Communications Act to establish a new, pro-competitive regime for interstate special access services.[60] The Commission explained that the incumbent LECs' then-current special access tariffs – which required a customer to purchase both the local loop and the local transport component – made it:

> impossible for customers to combine their own or CAP [Competitive Access Provider] facilities with portions of the LEC network to satisfy their special access needs. As a result, the current access tariff structure represents a barrier to the further development of special access competition.[61]

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[59] 47 U.S.C. § 251(i).

[60] *See Expanded Interconnection with Local Telephone Company Facilities,* First Report and Order, 7 FCC Rcd 7369, 7473-74 (1992).

[61] *Id.*

The Commission went on to find that requiring Tier I LECs to allow CAPs to obtain only the local loop would produce substantial public interest benefits by promoting competitive alternatives to the incumbents' services. The Commission therefore ordered the LECs to cease bundling loops and inter-office transport services, and to take affirmative actions to facilitate competition.[62]

In the present case, incumbent LECs' refusal to permit line sharing and their practices with respect to the provisioning of conditioned loops have limited the ability of new entrants to provide high-speed Internet connectivity services. Pursuant to its authority under Section 201(b) of the Communications Act, therefore, the Commission can require incumbent LECs to offer conditioned loops and line sharing through Federal tariffs.[63] Moreover, as it did in the *Special Access Expanded Interconnection Order*, the Commission can allow competitive providers of advanced telecommunications services used to provide Internet access to interconnect their transport facilities and collocate equipment at the incumbent's central office at rates established in federal tariffs.[64]

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[62] *See id.*

[63] The Commission's *Special Access Expanded Interconnection Order* makes clear the agency's authority under Section 205 of the Communications Act to adopt a "rate structure and pricing measures" governing the incumbent LECs' provision of interconnection services. *Id.*

[64] The Telecommunications Act of 1996 makes clear that the Commission has the authority to require physical collocation. Prior to the Telecommunications Act of 1996, the U.S. Court of Appeals for the D.C. Circuit, believing that physical collocation *might* raise constitutional questions, found that the Communications Act did not authorize the Commission to order physical collocation. *See Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1446 (1994). In adopting the Telecommunications Act, Congress over-ruled this decision by expressly granting the Commission authority to order "physical collocation of equipment necessary for interconnection." 47 U.S.C. § 251(c)(6); *see also* H.R. Rep. No., 104th Cong. 1st Sess., at 73 (1995) (explaining that the House bill's collocation "provision is necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See *Bell Atlantic Tel. Co. v. FCC,* No. 92-

CONCLUSION

For the foregoing reasons, the Commission should rule that: (1) advanced telecommunications services that use DSL technology to provide high-speed connectivity to the Internet are information access service; (2) an incumbent LEC that provides such advanced telecommunications services is subject to the requirements of Section 251 of the Communications Act; (3) an incumbent LEC must fulfill all of the duties specified in Sections 251(b) and 251(c) (except the duty of interconnection specified in Section 251(c)(2)) upon request of a carrier that seeks to provide advanced telecommunications services; and (4) pursuant to Section 251(a)(1), an incumbent LEC must interconnect with an advanced telecommunications provider on just, reasonable, and non-discriminatory terms. In addition, the Commission should adopt a Federal regime that grants providers of advanced telecommunications service used to provide high-speed Internet connectivity services with access to conditioned loops, line sharing, collocation, and interconnection pursuant to tariffs filed with the Commission.

Respectfully submitted,

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1619 (D.C. Cir. June 10, 1994)"). Pursuant to Section 4(i), the Commission can adopt a Federal tariffing regime to implement its collocation policies.